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No. 04-1033

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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NAB's petition challenges two aspects of the decision below: first, the Third Circuit's approval of changes to the FCC's local radio rules that forbid the common ownership and transfer of stations that would be permissible under the ownership levels established by Congress in the Telecommunications Act of 1996; and second, the decision to uphold the FCC's retention of a "top-4" television duopoly restriction, which forbids or sharply limits common ownership in many local television markets, including small and medium-sized markets where the benefits of common ownership are most needed. The arguments in the oppositions filed by the Commission and the "public interest respondents" are, with respect to the issues raised by NAB, irrelevant, erroneous, or both. NAB's petition thus warrants immediate review.[1]

I. This Court Should Review The Issues Raised In NAB's Petition Now.

Both the Commission and the public interest respondents contend that this case is in an "interlocutory posture" and that review by this Court would thus be "premature." FCC Opp. 12, 14-15; Pub. Int. Resp. Opp. 2. Those arguments have no application whatsoever to NAB's petition.

As an initial matter, each of the FCC rules that NAB challenges is fully in effect and ripe for review. The Third Circuit granted the FCC's request to allow the Commission's new local radio ownership rules to take immediate effect, and the Commission has been enforcing them ever since. After requesting and receiving this relief, the Commission can hardly be heard to contend now that review should be

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[1] Many of the same arguments raised by respondents were also set forth in the FCC's conditional cross-petition for a writ of certiorari (04-1168), and are thus also addressed in NAB's May 2, 2005 response to that conditional cross-petition.

delayed because the Third Circuit's ruling is interlocutory in this regard.

The top-4 restriction on common ownership of local television stations is also fully in effect. The Third Circuit's stay required the FCC to reinstate its "old" local television rule adopted in 1999, which contained the same prohibition on common ownership of top-4 stations. That old rule is the same one that the D.C. Circuit in *Sinclair* found arbitrary and capricious. *See Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 155, 169 (D.C. Cir. 2002). Further delay in reviewing the FCC's top-4 restriction thus preserves a rule that was found to be arbitrary and capricious three years ago.

The public interest respondents (but not the FCC) assert generally that review is nevertheless premature because the "rules challenged by Petitioners are not expected to be retained on remand." Pub. Int. Resp. Opp. 2. But the remand ordered by the Third Circuit is unlikely to affect the rules NAB challenges here. With respect to the FCC's new method of defining radio markets, its treatment of Joint Sales Agreements, and its local radio transferability restrictions, for example, the Third Circuit blessed the FCC's decisions, *see* Pet. App. 85a-90a; 91a-99a, and the Commission expressly sought and received authority to implement them immediately. The suggestion that any of these radio provisions will be altered on remand is therefore not credible, especially because the Third Circuit has taken the extraordinary step of retaining jurisdiction over the FCC's order on remand.

The same is true for the top-4 local television ownership restriction. The Commission reimposed the top-4 restriction after the D.C. Circuit in *Sinclair* remanded a television duopoly rule that contained the very same provision. *See Sinclair*, 284 F.3d at 152, 155. The Commission thus plainly believes that the top-4 constraint is appropriate regardless of what other limits are placed on the common ownership of

local television stations, and the Third Circuit's approval of the top-4 restriction will only harden the FCC's resolve.

Even apart from the specific status of the rules NAB challenges, respondents are wrong to suggest that resolving the meaning of § 202 of the 1996 Act is "premature." Congress passed the 1996 Act to relax the ownership restrictions that have a profound effect on the American public and the multibillion dollar media industry that serves them. Yet today, nearly a decade later, the basic standards that govern the Commission's ownership review proceedings remain unclear, and the FCC has yet to conduct a review that survived judicial scrutiny. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair*, 284 F.3d at 169; Pet. App. 11a-12a.

Moreover, as further discussed below, the Third Circuit and the D.C. Circuit have reached different conclusions about the meaning of § 202. The D.C. Circuit has vacated or remanded the FCC's revisions of the ownership rules as insufficiently deregulatory to satisfy Congress's directives in § 202. In sharp contrast, the Third Circuit views the Commission's subsequent efforts as overly deregulatory. Broadcasters, listeners, and viewers suffer the consequences of the resulting uncertainty. Common ownership that the Commission itself acknowledges would be beneficial to broadcasters and would improve service to the public is deterred or entirely precluded. In addition, the propriety of investments worth millions or even hundreds of millions of dollars is left uncertain – especially in light of the transfer restrictions that the FCC has placed on station combinations that were proper under the local radio ownership levels that Congress itself established in the 1996 Act.

That the Commission will soon be reviewing its ownership rules again is likewise no reason to delay review. *See* Pub. Int. Resp. Opp. 2. Quite the contrary. The next

mandatory review is in 2006, and the Commission will likely begin preparing for that review later this year. It is precisely because the Commission must undertake these regular reviews that this Court's review is urgent. Without certainty about the basic standard to be applied under § 202, future review proceedings – including the remand proceedings from the Third Circuit's decision here – will be an enormous waste of time and energy, and will fail to carry out Congress's directives or achieve the deregulatory benefits that Congress anticipated. *See, e.g.*, *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 275-76 (1976) (noting that "[t]he case was . . . remanded to the Commission for further proceedings" but that the Court granted certiorari "to consider the question whether the Court of Appeals had correctly construed the statutes controlling the Commission's jurisdiction"); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) ("The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case.").

In short, it is vital for this Court to clarify the meaning of § 202 now – and the order at issue is a perfect vehicle for doing so. Tremendous resources were poured into the most recent biennial proceeding, not only by the Commission but by all segments of the industry and by thousands of individuals. An extensive record was developed, and all interested parties had the chance to place in that record the facts they found most persuasive. The Commission issued a lengthy decision giving extensive consideration to all of the issues. The questions presented in NAB's petition are thus indisputably ripe for review.

II. The Local Radio And Local Television Ownership Restrictions At Issue Violate Section 202 Of The 1996 Act.

On the merits, the Third Circuit's unwillingness to abide by the directives of Congress in the 1996 Act fully warrants this Court's attention, particularly in light of the contrary approach taken by the D.C. Circuit.

1. The FCC's opposition highlights the need for immediate review. In the Commission's view – endorsed by the Third Circuit – the 1996 Act placed *no constraints at all* on the Commission's authority to regulate broadcast media ownership. According to the FCC, "Section 202(h) *does not impair* the Commission's authority to adopt and revise its ownership rules," FCC Opp. 24 (emphasis added), and "Congress's decision to set the permissible levels of common ownership" in § 202 "*does not constrain* the FCC's authority to regulate broadcast ownership in the public interest." FCC Opp. 25 (emphasis added).

That position is untenable. Section 202 of the 1996 Act unambiguously reflects a deregulatory mandate from Congress. *See, e.g.*, NAB Pet. 2-3. Virtually every subsection of § 202 reverses FCC ownership restrictions (including many that had been in place for decades) in an effort to *expand* common ownership and realize the benefits of competition. Indeed, § 202 was an extraordinary provision, as Congress specified in unusual detail the increased level of common ownership it wanted to permit for numerous local and national broadcast markets.

Accordingly, the FCC's contention that "'Congress gave no express indication [in the 1996 Act] that it intended to restrict the Commission's rulemaking authority," FCC Opp. 24 (quoting Pet. App. 34a n.18), is incorrect. The precise point of § 202 was to change how the FCC had been exercising its broadcast ownership authority, and to redirect

the Commission's efforts away from regulation and toward competition. *See, e.g.*, H. Rep. No. 104-204(I), at 118 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 86 (noting that "market developments require substantial deregulation of local station ownership" and that "[p]ermitting common ownership of stations will promote the public interest").

The Commission seeks refuge in the word "modify" in § 202(h). In the Commission's view, "Congress's use of the term 'modify,' in conjunction with the continued emphasis on the 'public interest' in Section 202(h)," makes clear that § 202 effectuates no "drastic reduction in the scope of the FCC's traditional licensing authority." FCC Opp. 25.

Such a reading not only renders § 202(h) superfluous, it ignores the rest of § 202, which is unambiguously deregulatory and reflects dissatisfaction with the FCC's determination of the public interest in the context of media ownership. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (words of a statute "must be read . . . with a view to their place in the overall statutory scheme"); *see also* NAB Pet. 22. Moreover, if the FCC were correct that "modify" permitted it to increase regulation beyond the levels specified in the 1996 Act, then under § 202(h) the Commission could have immediately restored the national radio ownership cap that § 202(a) abolished, and could have interpreted Congress's directive in § 202(c)(2) to determine whether to "retain, modify, or eliminate" local television rules as an authorization to immediately impose even stricter limitations rather than to steer some middle course between retention and elimination. This is not a viable interpretation of § 202, which plainly sought further deregulation, not the status quo or more restrictive regulation. *Cf. MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 228-29 (1994) (rejecting the FCC's plea for deference in defining the term "modify" to advance its own goals in the face of contrary policies adopted by Congress).

It is thus no surprise that the D.C. Circuit has adopted a view of the statute that is directly contrary to that adopted by the Third Circuit and advanced by the Commission here. *See* NAB Pet. 22-25, 28-29; *see also* Tribune Co. Pet. 24 (04-1036); NAA Pet. 23 (04-1045). According to the D.C. Circuit, § 202(h) embodies a "mandate" akin to "Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')." *Fox*, 280 F.3d at 1044. Applying that deregulatory mandate, the D.C. Circuit has vacated or remanded all of the ownership restrictions it has reviewed. *See infra* p. 3. The D.C. Circuit has plainly rejected the view – adopted by the Third Circuit and the FCC – that Congress's mandate in the 1996 Act was one of "business as usual."[2]

2. The misreading of § 202 adopted by the Third Circuit and defended by the Commission here merits this Court's attention. Review of media ownership rules is among the most significant tasks that the Commission carries out, as is clear from both the scope and the level of industry and public participation in the FCC proceedings below. The proper application of § 202 to the Commission's local radio and local television rules is therefore an important issue that is worthy of review even in the absence of a circuit split. *See* NAB Pet. 16-17 (describing Court's history of granting certiorari even in the absence of a split to review FCC orders involving media ownership and implementation of the 1996 Act).

Here, however, review is even more appropriate because there is a conflict between the Circuits on the meaning of

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[2] Notably, the FCC attacks a straw man in suggesting that NAB contends that the Commission can *never* restrict ownership in its § 202(h) review. To the contrary, NAB's position is that § 202(h) embodies a deregulatory mandate that requires the Commission to have a particularly strong justification for further restricting ownership, and that precludes the Commission from imposing ownership restrictions that are more restrictive than those imposed explicitly by Congress in the 1996 Act.

§ 202. Respondents counter that the Third Circuit and the D.C. Circuit applied "essentially the same standard." FCC Opp. 26; *see also* Pub. Int. Resp. Opp. 18. But no reader of *Fox*, *Sinclair*, and the decision below could reasonably come away with the impression that the D.C. Circuit and the Third Circuit applied "essentially the same standard." In *Fox* and *Sinclair*, the D.C. Circuit rigorously applied the 1996 Act's deregulatory mandate to the Commission's ownership rules, striking down or remanding each of the challenged provisions on the ground that the Commission had failed to adequately explain why further deregulation was not warranted.[3]

The Third Circuit took the opposite approach, analyzing the FCC's ownership rules to ensure that they were not too deregulatory and insisting on additional justification for even slightly deregulatory measures such as the modest loosening of the numerical restrictions on common ownership of local television stations. Pet. App. 78a-79a. Indeed, the Third Circuit chastised the Commission for deciding to retain numerical radio station ownership limits established by Congress in the 1996 Act, a decision that was apparently insufficiently *re*-regulatory, and it upheld other measures that were more restrictive of common ownership than the levels expressly set in the Act. *See* Pet. App. 85a (noting that "[t]he Commission is free to regulate or deregulate as long as its regulations are in the public interest and are supported by a reasoned analysis"); *see generally id.* at 85a-90a, 102a-106a.

To be sure, the Third Circuit paid lip service to the idea that § 202 is "deregulatory," *see* Pet. App. 34a-35a, but drained that term of all meaning. Indeed, by interpreting § 202(h) – a centerpiece of the 1996 Act's reform – as

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[3] The court's statements in this regard were about more than just the appropriate remedy once § 202(h) was triggered; they were about determining the meaning of § 202(h) itself. *See, e.g.*, *Fox*, 280 F.3d at 1040-45, 1049-52; *Sinclair*, 284 F.3d at 159, 162-65.

nothing more than a restatement of the Commission's underlying administrative law obligations, the Third Circuit effectively read that section out of existence, in sharp contrast to the approach taken by the D.C. Circuit. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 249 (1998) (avoiding a construction that would make a statutory provision "superfluous").

Respondents' attempt to downplay the deregulatory approach of the D.C. Circuit is unavailing.[4] The FCC claims, for example, that *Fox* stands for the propositions that "'nothing in § 202(h) signals a departure from [the] historic scope' of the Commission's public interest authority," and that section 202 "'determined only the starting point from which the Commission was to assess the need for further change.'" FCC Opp. 4, 25 (quoting *Fox*, 280 F.3d at 1043 & 1047 (alteration in original)). But the *Fox* court's reference to the "historic scope" of the Commission's role merely reaffirmed that the phrase "public interest" embraces "diversity (as well as localism)" – it says nothing about the degree to which the provision mandates deregulation. *Fox*, 280 F.3d at 1042. And the "starting point" to which the *Fox* court referred – a reference made in the context of a challenge to the Commission's failure to loosen or eliminate a television audience reach limitation that Congress had already relaxed from 25% to 35% -- was one for further deregulation, not for tightening regulations that Congress had explicitly made less onerous. *See id.* at 1033. Indeed, in *Fox* the D.C. Circuit invalidated the Commission's decision to *retain* the rules at issue in that case; any Commission

[4] At the time this case was filed, the public interest respondents clearly understood the deregulatory nature of *Fox* and *Sinclair*, and they sought to avoid review by the D.C. Circuit at all costs. They filed virtually identical petitions for review in the Second, Third, and Ninth Circuits, and then opposed the efforts of the FCC and the media petitioners to transfer the case to the D.C. Circuit, despite the fact that the FCC's order was in part a response to the D.C. Circuit's remands in *Sinclair* and *Fox*.

decision to impose even stricter ownership regulations (such as the radio rules approved by the Commission here) would have been rejected *a fortiori*.

Similarly meritless are respondents' protestations that the D.C. Circuit's later decision in *Cellco* overturned *Fox*. *Cellco* – which involved section 11 of the 1996 Act – addressed principally whether "necessary" in the phrase "necessary in the public interest" means "indispensable" to the public interest or merely "consonant with" it, concluding that the latter meaning is appropriate. *See Cellco P'ship v. FCC*, 357 F.3d 88, 97-98 (D.C. Cir. 2004). But the meaning of "necessary" is not controlling of the broader question of whether § 202(h) and the rest of § 202 embody a deregulatory mandate. *See, e.g.*, *Fox*, 280 F.3d at 1033, 1036, 1043-44, 1048. Section 202(h) can be deregulatory even if "necessary" does not mean indispensable.

Indeed, that is exactly what the *Fox* court held. In the decision on rehearing, the *Fox* court expressly left open the meaning of "necessary," but left in place the remainder of the initial *Fox* opinion, including the analogy of § 202(h) to "Farragut's order."[5] The D.C. Circuit's resolution of the question left open in *Fox* cannot be read to overturn the conclusion of the *Fox* court that § 202(h) and the remainder of § 202 embody precisely the deregulatory mandate that the Third Circuit and the FCC deny.

CONCLUSION

The petition for writ of certiorari should be granted.

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[5] The court's modification of *Fox* on rehearing, *see* Pub. Int. Resp. Opp. 19 n.13, involved only the single paragraph discussing the meaning of the word "necessary" in section 202(h) and two minor conforming changes. *See Fox*, 293 F.3d at 541 (describing amendments to initial opinion). The rest of the initial opinion remained untouched. *See id.*

Respectfully submitted,

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